(14) (14)

Nos. 92-757 and 92-938

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

BARBARA LANDGRAF, *Petitioner*,
v.
USI FILM PROD., et al., *Respondents*.

MAURICE RIVERS, et al., *Petitioner*,
v.
ROADWAY EXPRESS, INC., *Respondent*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND SIXTH CIRCUITS

BRIEF OF WARDS COVE PACKING COMPANY, AMICUS CURIAE, ON BEHALF OF RESPONDENTS

Submitted by:

MIKKELBORG, BROZ,
WELLS & FRYER
Douglas M. Fryer*
Douglas M. Duncan
Richard L. Phillips
James S. Thayer
Attorneys for Wards Cove Packing Company, Inc.

1001 Fourth Avenue Plaza
Suite 3300
Seattle, Washington 98154
(206) 623-5890

*Counsel of Record

ABCO Legal Printers, Seattle, Washington

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I. INTEREST OF *AMICUS CURIAE*

Amicus curiae Wards Cove Packing Company, Inc. operates salmon canneries in Alaska and has its principal office in Seattle, Washington.[1] The company and Dole Food Company, Inc. were the petitioners in Wards Cove Packing Company, Inc. v. Atonio, 490 U.S. 642 (1989). This Court there held that plaintiff in a Title VII[2] action bears the burden of isolating and identifying the specific employment practices allegedly responsible for statistical disparities in the composition of the work force; that racial imbalance in one segment of an employer's work force is not sufficient to establish a *prima facie* case of unintentional discrimination ("disparate impact") with respect to the selection of workers in other segments of the employer's work force; and delineated the parties' respective burdens of

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[1] The parties have consented to the filing of this brief. The letters of consent are being filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

proof. Accordingly, the Court reversed and remanded the underlying court of appeals decision, Atonio v. Wards Cove Packing Co., Inc., 827 F.2d 439 (9th Cir. 1987).

In response to portions of Wards Cove and to several other decisions,[3] Congress passed the Civil Rights Act of 1991. The House Report on the Act said that the Supreme Court ruled in Wards Cove that once a complaining party proves an employment practice has a disparate impact, the employer has only the burden of production, not the burden of persuasion in justifying the practice. H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess., 29 (1991).

The Congress in enacting the 1991 Act stated:

The Congress finds that —

* * *

[3] The Civil Rights Act of 1991 also addresses Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), Martin v. Wilks, 490 U.S. 755 (1989), Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989), and Patterson v. McLean Credit Union, 491 U.S. 164 (1989). See H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess. 23, 45, 49, 60, 89 (1991).

> (2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of federal civil rights protections; . . . .

To remedy the perceived consequence of the Court's interpretation of Title VII, Congress in the 1991 Act added to Title VII new subsections 701(l) through (p) and 703(k). H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess. 32 (1991). Summarizing the effects of the new legislation, the House Report said, "The Committee intends the proof of business necessity to be an affirmative defense as to which the respondent bears the burden of persuasion." Id., at 34.[4] Congress, then, has acted specifically to overturn part of the Wards Cove decision.[5]

[4] The House Report was drafted by the Education and Labor Committee and the Judiciary Committee. No Senate Report was submitted with the legislation. H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess. 1 (1991).

[5] The Civil Rights Act of 1991 left intact this Court's holding that internal comparative statistics are not probative where the employer hires from the external labor market. The Act also codifies, in §§ 105(a)(k)(1)(A) and (B), this Court's holding that plaintiffs bear the burden of persuasion with respect both to impact and to causation, and codifies,

The question presented by these consolidated cases is whether the Civil Rights Act of 1991 applies to cases pending when the Act was passed. The Senate passed the legislation on October 30, 1991, the House on November 7, 1991, and the President signed the Act into law on November 21, 1991. Statement of President George Bush Upon Signing S.1745, 27 Weekly Comp. Pres. Doc. 768 (Nov. 21, 1991). As of that time, after Wards Cove had been reversed and remanded by this Court and then remanded by the Ninth Circuit, the District Court had (in January 1991) again dismissed all of plaintiffs' claims, and plaintiffs had once again appealed to the Ninth Circuit. Their appeal has been pending for over two years.

Section 402(b) of the Act (codified in a note at 42 U.S.C. § 1981) provides:

> Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

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in § 105(a)(k)(1)(A)(i), this Court's holding that plaintiffs must prove the disparate impact of a particular practice.

Only the Wards Cove Packing Company v. Atonio case fits this exception. The section was added to the Act because it was thought that the companies, which had been found innocent of discrimination under the law existing at the time, should not be required to relitigate a case filed in 1974 and tried in 1982 under legislatively-mandated standards passed in 1991. 137 Cong. Rec. S15953, S15966 (daily ed. Nov. 5, 1991).

In their present appeal, the Wards Cove plaintiffs argue that Section 402(b) is unconstitutional and that new standards of proof adopted by the Civil Rights Act of 1991 retroactively apply to the ongoing Wards Cove litigation. Therefore *amicus curiae* Wards Cove Packing Company, Inc. is interested in the present consolidated cases.

II. SUMMARY OF ARGUMENT

The Wards Cove litigation offers an example of the extreme unfairness and enormous difficulties of the presumption of retroactivity. The case was tried eleven

years ago based on an evidentiary period that is a *generation* old. The losing litigants were active in seeking changes in the law in order to overturn this Court's decision in the case. The case is now on its fourth appeal to the Ninth Circuit and the appellant plaintiffs there argue that the Civil Rights Act of 1991 should be retroactively applied. The result of retroactive application of such new rules — whether they be labeled substantive or procedural — will protract litigation, waste judicial resources, and disturb reasonable expectations as to the finality of litigation. The presumption against retroactivity is the more just rule.

III. ARGUMENT

A. The Effects of Retroactivity Are Particularly Evident and Egregious as Applied to Cases Such as *Wards Cove*.

1. The History of the *Wards Cove* Litigation is as Instructive as it is Torturous.

That conduct should ordinarily be assessed under the law that existed when the conduct took place is a principle that has "timeless and universal human appeal."

Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J. concurring). An example of what may happen should this principle be subverted is found in the Wards Cove case, a particularly noxious eventuality noted by the District of Columbia Circuit in Gersman v. Group Health Ass'n, Inc., 975 F.2d 886, 890 (D.C. Cir. 1992):

> Given the potentially drastic impact of retroactivity of the disparate impact section on the Wards Cove defendants, it is not unthinkable that legislators wished to reassure the employers that they would not face recoveries of back pay plus interest from some time in the early 1970s for conduct committed twenty years or so before passage of the statute.

Briefly reviewing the convoluted history of the Wards Cove litigation is instructive.[6] In June 1969 plaintiffs Eugene Baclig and Gene Viernes first went to work for Wards Cove. Plaintiff Frank Atonio was first

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[6] As indicated above, Section 402(b) exempts the Wards Cove litigation from application of the Act. However, plaintiffs in Wards Cove now contend that Section 402(b) is unconstitutional and that the Act, therefore, should apply retroactively to the litigation.

employed by the company in June 1972. In October 1973 Atonio and three others filed a complaint against Wards Cove with the EEOC. A conciliation agreement based on the Commissioner's charge was entered between the EEOC and Wards Cove in February 1974. In March 1974 a complaint was filed by Frank Atonio and nine others against Wards Cove, Castle & Cooke (now Dole Food Company, Inc.) and their joint venture, Columbia Wards Fisheries. Wards Cove, supra, 490 U.S. at 647.

In February 1975, the District Court dismissed all Title VII claims against Wards Cove on the grounds that plaintiffs improperly identified defendant Wards Cove in the EEOC charges. This order was reversed on an interlocutory appeal immediately before trial in March 1982.[7]

[7] Atonio v. Wards Cove Packing Co., Inc., 703 F.2d 329 (9th Cir. 1982). Plaintiffs took an earlier interlocutory appeal from the denial of a preliminary injunction in July 1977. The denial of injunction was affirmed by an unreported decision of the Ninth Circuit, No. 77 - 3006, 3007 (July 16, 1980).

In May 1982, after eight years of discovery, an intense twelve-day trial was held in district court at which over 100 witnesses testified. In October 1983, the district court entered judgment for the employers based on 172 findings of fact. The court dismissed all of plaintiffs' "disparate treatment" claims (intentional discrimination) and rejected as unproven most of the disparate impact challenges to the company's practices. With respect to so-called "subjective" employment practices, the court found they were not subject to attack under a disparate impact theory. Wards Cove, supra, 490 U.S. at 648.

The judgment for the employers was affirmed in all respects by the Ninth Circuit in August 1985, Atonio v. Wards Cove Packing Co., Inc., 768 F.2d 1120 (9th Cir. 1985), but that decision was vacated in November 1985 when the Court of Appeals agreed to hear one aspect of the case *en banc*. Wards Cove, supra, 490 U.S. at 648, citing Atonio v. Wards Cove Packing Co., Inc., 787 F.2d 462 (9th Cir. 1985). The *en banc* hearing was limited to the

question of whether subjective hiring practices should be examined under a disparate impact model. In February 1987, the *en banc* court held that the disparate impact analysis should be applied to such practices, reversing previous decisions of the circuit. The case was reassigned to the original panel. Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477 (9th Cir. 1987).

In September 1987, the original panel did an about face on the impact analysis[8] and held plaintiffs had made out a *prima facie* case of unintentional discrimination in hiring. 827 F.2d 439 (9th Cir. 1987).[9] Wards Cove

[8] The dismissal of disparate treatment claims was again affirmed: Atonio v. Wards Cove Packing Co., supra, 827 F.2d at 442. A petition for certiorari to review this dismissal was denied. 485 U.S. 989 (1988).

[9] The practical effect of the Ninth Circuit decision was to overrule existing Ninth Circuit authority and having found a *prima facie* case of disparate impact, to shift the burden of proof to the employer. Plaintiffs had argued the same evidence in support of both their disparate treatment and disparate impact theories. Under the disparate treatment model, the employer need only articulate a non-discriminatory reason to meet its burden of rebuttal (Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981)); however, under the Ninth Circuit's view the change in

sought review of the decision, and the case was argued before this Court in January 1989.

In June of that year, this Court reversed the Ninth Circuit on the well-established ground that statistical disparities between dissimilar classifications caused by an artificial oversupply of minorities in one job department are irrelevant to a proper disparate impact analysis. The Court went on to hold that the plaintiff always has the burden of persuasion, and the defendant may justify a practice causing disparity by showing that the practice was based on a legitimate employer goal. The case was remanded to inquire as to whether plaintiffs had established a *prima facie* disparate impact case on any other basis, besides their discredited statistics. Wards Cove, supra, 490 U.S. at 659-661.

decisional law would have shifted the burden of persuasion to the employer using the disparate impact theory on the same evidence. Atonio v. Wards Cove Packing Co., supra, 827 F.2d at 439.

In January 1990, after denying plaintiffs' motion for further briefing, the Ninth Circuit Court of Appeals remanded the case to the District Court, which in January 1991 issued a new decision finding no disparate impact and dismissing plaintiffs' case. Plaintiffs again appealed, and in September 1992 the case was reargued before a new three-judge panel of the Ninth Circuit Court of Appeals.[10]

The view from 1993 of the Wards Cove litigation is of a case for which the at-issue events occurred more than two decades ago and which was tried eleven

[10] Plaintiffs in their appeal to the Ninth Circuit are contending that the 1991 Act has changed the requirements of proof necessary to establish a *prima facie* case of disparate impact and the proof required to justify the employer's practices. Defendants have argued that plaintiffs have insufficient evidence to establish a *prima facie* case under the new Act. The United States intervened in the case and argued that the Civil Rights Act of 1991 is not retroactive. U.S. Br. in Atonio v. Wards Cove Packing Co., No. 91-35306. The United States has now reversed its position. Infra, n.15.

years ago.[11] The employers have spent about $2 million on the litigation. 137 Cong. Rec. H3932 (daily ed. June 5, 1991). The case has been fully tried, argued on appeal six times, and reargued on remand in the district court. At no point has a court found that Wards Cove Packing Company or Dole Food Company discriminated against its employees.

2. If the Act is Applied Retroactively, A New Trial May be Required in a Case Already Two Decades Old.

The Wards Cove plaintiffs now urge on appeal that the "disparate impact" portions of the new law (Section 105(a)), be retroactively applied. Those provisions (1) allow a complaining party to establish that the elements of an employer's decision-making process are incapable of separate analysis and therefore may be analyzed as a whole, (2) place the burden of persuasion on the employer once a

[11] Commenting on the *thirteen*-year-old Title VII case before it, the court in Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1168 (5th Cir. 1978) called the action a "paleolithic museum piece." Using that standard, Wards Cove must be measured in geologic rather than mere anthropologic time.

prima facie disparate impact case is shown and (3) change this Court's standards as to the degree of proof necessary to justify a business practice that causes impact.[12] To get around the clear bar of Section 402(b), plaintiffs argue it is unconstitutional.

To carry the Wards Cove plaintiffs' arguments to their logical extreme would permit not only a new trial, but new discovery to ferret out evidence as to whether the elements of selection process were capable of separate analysis, discovery of evidence now more than

[12] The Ninth Circuit has stated that the 1991 Act merely "return[s] the law to its previous posture." Estate of Reynolds v. Martin, 985 F.2d 470, 475 (9th Cir. 1993). However, it is presumptuous of the circuits to say that Wards Cove was more than a clarification of existing tensions within Griggs v. Duke Power Co., 401 U.S. 424 (1971). See, Supreme Court, Leading Cases, 103 Harvard Law Review 137, 350-361 (1989). It is, of course, not the function of the 1991 Congress to interpret the intent of the 1866 or 1964 Congresses. It is the function of Congress to declare contemporary policy based on politics rather than resolve a dispute between Congress and the Supreme Court. Luddington v. Indiana Bell Telephone Co., 966 F.2d 225, 228 (7th Cir. 1992). And clearly the provision dealing with the challenges to selection practices as a whole (§ 105(a)) is entirely new.

twenty years old. A trial could not easily be recreated eleven years after it occurred and a generation after the case period began. For instance, the employers' principal witness as to the crucial labor market analysis, Dr. Albert Rees, is deceased. *New York Times* (Sept. 8, 1992). Two of the plaintiffs are dead. Many witnesses would be testifying to events that occurred half their lifetimes ago.[13]

3. The Potential of Retroactivity has Spurred Plaintiffs in *Wards Cove* to Retry Their Case in Congress.

The extent to which the Wards Cove plaintiffs will go to attempt to have Congress retry a case plaintiffs have been unsuccessful with in the courts was made evident during the passage of the Civil Rights Act of 1991. The plaintiffs themselves assiduously lobbied for particular language in and passage of the 1991 Act (and its predecessors) with the assistance of Senator Brock Adams,

[13] In Mozee v. American Commercial Marine Service Co., 963 F.2d 929, 938 (7th Cir.), cert. denied, 113 S. Ct. 207 (1992), the court stated that after fifteen years of litigation even a *remand* under a new statute is unjust.

whose former law firm (Garvey, Schubert, Adams and Barer) had been trial counsel for plaintiffs.[14] After negotiations taking a year and one-half, the leaders of the civil rights community, led by Senator Kennedy, finally reached an agreement with the Administration regarding civil rights legislation. 137 Cong. Rec. S15966 (daily ed. November 5, 1991). Section 402(b), exempting Wards Cove from the new standards of the Act had been a part of the compromise. No amendment was offered to strike that provision, as was the right of any member of Congress. Id. at S15966. But when the Senate approved the bill, it

[14] To counter the Atonio plaintiffs' efforts, Wards Cove Packing Co. lobbied Congress for an exemption of the Atonio case from the disparate impact provisions (only) of the Act. The Company's argument was grounded in common sense and simple justice: the evidence (as opposed to media opinion) had twice been examined and showed the Company did not discriminate; in fact, it hired more minority workers than the labor supply would predict. If any case should not have to go through the litigation wringer a third time, it was this one. That seventy-three senators voted for the exemption is testament to the basic fairness that the case be left alone by Congress.

omitted the section due to a mistake by legislative counsel. 137 Cong. Rec. S15953 (daily ed. November 5, 1991).

The bill making a technical correction to restore Section 402(b) to the Act was supported by the Act's prime sponsors, Senators Danforth and Kennedy. Id. at S15953. Senator Dole commented, "I must say, if we cannot make technical corrections around this place after somebody has made an agreement, we are never going to get anything done." Id. at S15953.

Nevertheless, seeing an opportunity to alter the Wards Cove litigation, Senator Adams rose in the Senate to argue against adoption of the technical resolution, S. Res. 214. His argument was rejected. With bipartisan support, Section 402(b) was restored, with 73 senators supporting the amendment. 137 Cong. Rec. S15967-8 (daily ed. November 5, 1991). But in March 1993, based on the Wards Cove plaintiffs' complaints, Congressman McDermott, a Washington Democrat, introduced the so-called "Justice for Wards Cove Workers Act" to remove

Section 402(b) from the Civil Rights Act of 1991 and undo the compromise reached only five months earlier.

4. Retroactivity Encourages Endless Litigation.

Plaintiffs' arguments regarding retroactivity are, then, an invitation for this Court to allow litigation to ride an infinite loop. A party wins at trial and on appeal. Then the losing party successfully lobbies to change the law, making it retroactive so that it alters the burden of proof or other component aspects of the case. A new trial and subsequent appeals follow. The losing party in this second round successfully lobbies Congress for new retroactive legislation requiring yet another trial and appeal. This scenario is not as farfetched as it first seems, given that the Wards Cove plaintiffs are well on their way to constructing it.

In its *amicus curiae* brief, the NAACP argues that since Congress has "repudiated" this Court's 1986-1991 decisions in the Act, the failure to apply the changes in law retroactively will deny the Act's protections to victims of

discrimination and will postpone the effective date of the legislation from 1991 to 2000. NAACP Brief at 8. However, under our legal process the fact of discrimination must be established by trial. As the NAACP concedes, civil rights litigation is notoriously long, complex and expensive. Id. at 7-8. Decades of attorneys' time, decades of the parties' time, decades of court time and millions of dollars may be spent in such litigation. Id. at 7. The concepts of due process and separation of powers are more important than the results of a given litigation. Defendant employers have a right to rely on the judicial process to determine claims, effectively and finally, without allowing plaintiffs new opportunities to obtain relief on the same claims with new theories, with changes in the burden of proof or with changes in the standards by which the employers' conduct is to be judged.

B. Language of the Act Does Not Support Petitioners; Section 402(b) Was Inserted on Behalf of Wards Cove As Insurance Against an Uncertain Construction of the Act.

It is argued by petitioners here that because Section 402(b) and Section 109(c)[15] specifically apply prospectively, it suggests Congress intended the balance of the Act to apply retrospectively. Only one Court of Appeals, the Ninth Circuit, has accepted this reasoning. Davis v. City and County of San Francisco, 976 F.2d 1536 (9th Cir. 1992).

The other seven circuits have reached the common sense conclusion based on political reality that the clauses were nothing more than "insurance policies." For example, in Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir.

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[15] Section 109(c) provides that "[t]he amendments made by this Section shall not apply with respect to conduct occurring before the date of the enactment of this Act." Pub. L. No. 102-166 § 109(c), 105 Stat. 1071 (1991), 42 U.S.C.A. § 2000e (West Supp. 1992). There seems to have been no floor debate whatsoever on § 109(c). Section 109 specifically overrules EEOC v. Arabian Amer. Oil Co., ____ U.S. ____, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) by providing that Title VII applies to U.S. citizens employed in foreign countries.

1992), the Fifth Circuit Court of Appeals concluded, "Congress may have wanted to ensure that certain retroactive applications of the statute were barred without intending to reach any general conclusion about the statute's general retroactive application." See also, Gersman, supra, 975 F.2d at 890 (where the D. C. Circuit said the two specifically prospective sections might be viewed as "insurance policies" of prospective application, rather than as redundancies); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992) (opponents of retroactivity "'hedged their bets'" by specifically making two sections prospective only); Mozee, supra, 963 F.2d at 933; Butts v. City of New York, Dept. of Housing, etc., 990 F.2d 1397 (2d Cir. 1993).

Wards Cove Packing Company argued to Congress that its case had been tried, a decision rendered, and it was fundamentally unfair to allow plaintiffs to retry a case involving conduct which occurred in 1971 based on legal standards first created in 1991. Such retroactivity was akin

to asking employers in 1991 to govern their conduct by standards which Congress might create in 2011.

Until the final compromise version of the 1991 Civil Rights Act was crafted, every version of the bill introduced by proponents of the legislation was retroactive. Wards Cove asked that the bill be amended to include the language which became Section 402(b). Given the nature and content of the continuing appeals by the Wards Cove plaintiffs, when the final legislative compromise was being crafted, Wards Cove asked that Section 402(b) be included as an extra insurance policy in case plaintiffs could persuade a court that the Civil Rights Act of 1991, which was intended to be prospective, was, in fact, retroactive.

These conclusions are borne out by comments in Congress. Representative Hyde stated that Section 402(b) was "unnecessary" and "surplusage" and that it did "not accomplish or achieve a thing and it should not be the subject of so much excitation." 137 Cong. Rec. H9512 (daily ed. Nov. 7, 1991). Similarly, Senator Gorton said,

"The language in question does no more than reaffirm for one specific case the more general mandate of the bill that the civil rights amendments will be applied prospectively." 137 Cong. Rec. S15966 (daily ed. Nov. 5, 1991). Senator Durenberger said that "the general clause that states that the bill is prospective is simply reinforced by this amendment that provides merely one example where the bill is prospective." Id. And Senator Murkowski said the section "should not be viewed as creating an implication regarding whether or not this legislation applies retroactively generally." 137 Cong. Rec. S15493 (daily ed. Oct. 30, 1991).[16]

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[16] Senator Murkowski also noted that a Congressional Act to actually change the result in Wards Cove might violate constitutional separation of powers. 137 Cong. Rec. S15954 (Nov. 5, 1992).

C. The Procedural/Substantive Distinction Suggested by the United States Fails to Cure the Inequities of Retroactivity Because Procedural Changes May Have Substantive Impact.[17]

The United States and the EEOC in their brief suggest that the retroactive application of the 1991 Act is justified because it is "procedural" and "remedial." (U.S. Br. 17).[18] They suggest that the Court adopt a procedural/substantive bright line, arguing that it is not manifestly unjust to require a "wrongdoer" to bear costs (albeit

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[17] The United States, of course, has retroactively changed its position with the new policies of an Administration which came into office 13 months after passage of the 1991 Act.

[18] Terms such as "remedial", "restorative" and "procedural" may be viewed as euphemisms to obscure the true impact of change. See Orwell, "Politics and the English Language," Collection of Essays, Harcourt & Brace (1950), p. 363: "In our time, political speech and writing are largely the defense of the indefensible." He noted, for example, that imprisonment without trial may be described as "elimination of unreliable elements." Similarly Lou Fuller cautions against the temptation to accept retrospective laws when they merely cure "irregularities of form." He notes a retroactive statute passed by Hitler during the Roehm Purge which converted murders into legal executions. Fuller, The Morality of Law, Yale Press (1969), p. 54.

increased costs) caused by pre-Act conduct. (Id. 8). They concede, however that the distinction breaks down when the change in procedures may require a new trial (Id. 24, n.14). Implicit in this concession is the realization that even procedural changes may have substantive impact.[19] The circuits have struggled with this issue in a variety of contexts but, with the exception of the Ninth Circuit, have come generally to the same conclusion, namely, that whether labeled procedural or substantive, the changes affect substantive rights.[20]

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[19] "But such changes can have as profound an impact on behavior outside the courtroom as avowedly substantive changes." Luddington, supra, 966 F.2d 225, 229. The Court of Appeals in the present case noted that a change in procedural rules should not invalidate procedures followed before the new rule was adopted. Landgraf v. USI Film Products, 968 F.2d 427, 433 (5th Cir. 1992), citing Belser v. St. Paul Fire & Marine Ins. Co., 965 F.2d 5, 9 (5th Cir. 1992) ("[N]ew procedural statutes do not ordinarily invalidate steps already taken under old law," citing Wilson v. General Motors Corp., 888 F.2d 779, 781 (11th Cir. 1989); Belanger v. Great American Indemnity Co., 188 F.2d 196, 198 (5th Cir. 1951)).

[20] Not retroactive: Mozee, supra, 963 F.2d 937 (case had been tried); Butts, supra, 990 F.2d at 1397 (cause of action if any arose pre-Act); Johnson, supra, 965 F.2d at

Some sections of the new Act could be called "procedural" e.g. right to jury trial (§ 102); right to compensatory or punitive damages (§ 102); recovery of expert witness fees (§ 113); commencement of statute of limitation (§ 114); prejudgment interest (§ 114). Others are arguably "substantive" e.g. creation of a cause of action for post-hire conduct (§ 101); expansion of right to challenge seniority systems (§ 112); prohibition of race-norming test scores (§ 106). However, *all* sections have substantive impact. For example, the increase in potential liability to include compensatory and punitive damages (§ 102) clearly has substantive impact (§ 102).

1373 (case in litigation 18 years); Landgraf, supra (amended damages a sea change in employer liability and a retrial would be a manifest injustice); Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1992) (a new statute of limitation is arguably substantive); Laynes v. AT&T Technologies, Inc., 976 F.2d 1370 (11th Cir. 1992) (case already tried and litigated two and a half years); Gersman, supra, 975 F.2d 886 (pre-Amendment conduct); Huey v. Sullivan, 971 F.2d 1362 (8th Cir. 1992) (prejudgment interest); but see, *retroactive*: Estate of Reynolds, supra, 985 F.2d at 470 (prejudgment interest); Davis, supra, 976 F.2d at 1536 (expert witness fees).

None of the circuits has expressed a preference for a substantive/procedural bright line. That they have analyzed the retroactivity issues somewhat differently suggests that such a distinction is difficult in application.

In the two cases before this Court the circuits have both indicated a preference for prospective application.[21] The panel in Landgraf, however, did not find it necessary to ground its decision on a general presumption because it found a new trial and substantially increased exposure to damages would be manifestly unjust. 968 F.2d 427, 433.

The Second, Seventh, Eleventh and District of Columbia Circuits have applied the presumption in Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988), to the facts of the cases.[22]

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[21] See also Johnson, supra, 965 F.2d at 1375; Vogel v. City of Cincinnati, 959 F.2d 597 (6th Cir. 1992).

[22] Butts, supra, 980 F.2d 1397; Mozee, supra, 963 F.2d 929 (7th Cir.); Gersman, 975 F.2d 886; Baynes, supra, 976 F.2d 1370.

The Sixth and Eighth Circuits have held the Act as a whole is not retroactive.[23] The Eighth Circuit *en banc* concluded that a case-by-case application of Bradley v. School Board, 416 U.S. 696 (1974), would be unworkable. Hicks v. Brown Group, 982 F.2d 295, 298 (8th Cir. 1992) (*en banc*). The Sixth Circuit held against retroactivity on the ground that as a whole the Act would affect substantive rights. Harvis v. Roadway Exp., 973 F.2d 490, 497 (6th Cir. 1991). Judge Posner in Luddington, although limiting the holding to cases commenced before the Act, reasoned that:

> Retroactive application carefully tailored to situations (quite possibly illustrated by this case) in which those reliance interests are minimal would engender enormous satellite litigation and associated uncertainty to fix an indistinct boundary.

[23] Vogel, supra, 959 F.2d 594; Harvis, supra, 973 F.2d 490; Fray, supra, 960 F.2d at 1377; Hicks, supra, 982 F.2d at 298.

966 F.2d at 229. Accordingly, this Court should clarify the Bowen/Bradley tension, fix a distinct boundary and adopt the more just rule.

D. The 1991 Act Was Passed as a Compromise After Clearly Retroactive Similar Legislation Had Been Rejected.

Although comments in Congress as to retroactivity may be inconclusive, in this instance, deeds rather than words are telling. The Civil Rights Act of 1990 contained a section explicitly providing for retroactive application of the Act. Civil Rights Act of 1990, Section 15, reported in H. Rep. No. 101-644, Part 1, 101st Congress, 2nd Sess. (1990).[24] The President vetoed the bill, and his veto message specifically singled out "unfair retroactivity rules" as a reason for the veto. President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990,

[24] For example, Section 15(a)(6) of the Civil Rights Act of 1990 provided that the counterpart to Section 101(2)(b) of the Civil Rights Act of 1991 would apply to all cases pending on or commenced after June 15, 1989, the date of the decision in Patterson, supra. See 136 Cong. Rec. S9968 (daily ed. July 18, 1990).

26 Weekly Comp. Pres. Doc. 1632, 1634 (Oct. 22, 1990). The veto could not be overridden. Bipartisan sponsors in the Senate drafted a bill, S.1745, that deleted the 1990 bill's provisions regarding retroactivity. See 137 Cong. Rec. 15503-12 (daily ed. Oct. 30, 1991). The Congress "knew from their 1990 experience that because of the President's veto power, they could not enact a law that purported to legislate retroactivity." Fray, supra, 960 F.2d at 1377 (emphasis by court). The floor debate in both chambers emphasized that it was necessary to pass a bill the President would sign. See, e.g. 137 Cong. Rec. S15344 (daily ed. Oct. 29, 1991) (statement of Senator Kennedy); 137 Cong. Rec. H9515 (daily ed. Nov. 7, 1991) (statement by Speaker of the House Foley).

That deleting the retroactivity rules was a major reason the President signed the 1991 Act, whereas he refused to sign the 1990 Act, was made clear in the President's statement upon signing the 1991 Act, in which he instructed all executive branch officials to follow "as

authoritative interpretive guidance" the memoranda of law inserted into the Congressional Record by Senator Dole which stated, among other things, that the 1991 Act was not retroactive. Statement of President George Bush Upon Signing S.1745, 1991 U.S.C.C.A.N. 768, 769 (Nov. 21, 1991) (adopting memoranda at 137 Cong. Rec. S15472 (daily ed. Oct. 30, 1991) and 137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991)). When Congress omits in a later version of a bill a provision in an earlier bill criticized by the President upon vetoing the earlier bill, the omission in the later bill demonstrates Congress' abandonment of the position taken in the omitted provision. Amalgamated Ass'n. of Street, Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Rel. Bd., 340 U.S. 383, 392, n.15 (1951).

Congress clearly knew the words to use if it intended to make the statute retroactive. Omitting the retroactivity provisions in the 1991 version of the Act was part of the compromise that allowed the Act to gain bipartisan support

and prompted the President to sign the bill into law. This history of the Act is unambiguous: a bill requiring retroactivity that failed to become law was followed a year later by a bill omitting the requirement of retroactivity. The intent of the legislature was clearly that the Civil Rights Act of 1991 apply prospectively only.

The Ninth Circuit is the only appeals court to find the Act retroactive. In Davis, supra, 976 F.2d at 1536, the Court said Section 109(c) and Section 402(b) comprised strong evidence of legislative intent that the Act was to apply retroactively in all circumstances. The Court noted that prospective application of the Act would render the two sections superfluous. The Court also said that because Congress explicitly intended to reverse several Supreme Court decisions where Congress thought the Court construed several statutes too narrowly, it was likely "Congress intended the courts to apply its new legislation, rather than the Court decisions which predated the Act, for the benefit of the victims of discrimination still before

them." Id. at 1552. But in neither Davis nor Estate of Reynolds, supra, 985 F.2d at 470 did the Ninth Circuit decide that plaintiffs were victims of discrimination because of new law. In both cases that determination was already made on the basis of prior law. Davis added expert witness fees and Estate of Reynolds added pre- and post-judgment interest to awards already made under prior law. Thus the language of both decisions is broader than the issues posed. None of the circuits has adopted a rule which would overturn a ruling on liability.

E. The Presumption Against Retroactivity is the More Established and the More Just Doctrine.

"The bias against retroactive laws is an ancient one." Smead, The Rule Against Retroactive Legislation, a Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775 (1936). Justice Scalia noted in his concurring opinion in Kaiser Aluminum, supra at 855, that the presumption of prospective application is rooted in history and tradition. Noting that the principle was recognized by the Greeks, the

Romans, by English common law, and by the Code of Napoleon, he said "It has long been a solid foundation of American law." Kaiser Aluminum, id. He quoted Justice Story:

> [R]etrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact.

Id. (quoting J. Story, Commentaries on the Constitution § 1398 (1851)).[25] In United States v. Security Industrial

[25] An extensive list of early cases where the Supreme Court said laws are presumed to act prospectively is found in Smead, supra, at 781 n.22. The author summarized:

> American commentators and courts also viewed [the principle] as based on the same concepts of justice and jurisprudence of which the English common law held it to be an expression. Retroactive laws were held to be oppressive and unjust, and it was maintained that the essence of a law was that it be a rule for the future. The United States Supreme Court has stated expressly that retrospective legislation would not be favored, that such laws were contrary to American jurisprudence, and that the court, in the absence of an express command or "necessary implication" to the contrary will preserve that a law is designed to act prospectively. [Footnotes omitted.]

Bank, 459 U.S. 70, 79 (1982) decided after Bradley, the court quoted from United States Fidelity & Guaranty v. United States ex rel. Struthers Wells Co., 209 U.S. 306, 314 (1908): "'The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.'"[26] Justice Scalia, concurring in Kaiser Aluminum, supra at 855, also indicated that the presumption of prospective application was based on notions of fairness in that parties to a suit should only be held accountable for the laws at the time of their conduct. As the Court of Appeals for the Second Circuit said in Butts, supra, 990 F.2d at 1409, "While the Ex Post Facto Clause of Article I, Section 9 of the United States Constitution applies only to criminal statutes, the fundamental principal animating that clause, that persons be given an opportunity to conform their

[26] See also authority collected in Bowen, supra, 488 U.S. at 208.

conduct to the law before incurring its sanctions, is equally applicable to civil cases."[27]

In addition, there are compelling reasons to give parties a reasonable expectation of the finality of litigation. Every trial lawyer should expect to play by the rules — procedural or substantive — in effect at the time of trial. The cost and risk of litigation should not be subject to the subsequent political process.

IV. CONCLUSION

A lofty ambition of the law is to settle expectations. To make plain the relations of our citizens is the very purpose of the legislative and judicial processes. A house is not built on shifting sands, and neither should the hopes of

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[27] Retroactive application of legislation to a particular case also raises separation of powers and due process concerns. Rights vest in a judgment. The power of a legislature to disturb by subsequent legislation the substantive rights vested by the judgment is constitutionally restricted. McCollough v. Virginia, 172 U.S. 102, 123-124 (1898); Hodges v. Snyder, 261 U.S. 600, 603 (1923). Further, the right to decide cases free from domination by other branches of government is inherent in judicial power. Northern Pipeline Const. Co. v. Marathon Pipe Co., 458 U.S. 50, 58 (1982).

those who seek redress in the courts. By arguing that the Civil Rights Act of 1991 applies to cases pending when the Act was enacted, petitioners seek to judge events long passed by the standards of those currently best able to manipulate the legislative process. This Court should reject their arguments and hold that the Act does not apply to cases pending when the legislation was passed.

MIKKELBORG, BROZ,
WELLS & FRYER

By _____
Douglas M. Fryer
Douglas M. Duncan
Richard L. Phillips
James S. Thayer
Attorneys for
Amicus Curiae
Wards Cove Packing
Company, Inc.